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Supreme Court, U.S.
FILED
AUG 26 1991
OFFICE OF THE CLERK

No. 91-337

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

JOE TISDALE, ET AL.,

APPELLEES,

VS.

ROBERT J. SHEHEEN, SPEAKER OF THE HOUSE OF REPRESENTATIVES IN HIS OFFICIAL CAPACITY AND AS REPRESENTATIVE OF THE MEMBERSHIP OF THE SOUTH CAROLINA HOUSE OF REPRESENTATIVES,

APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA (THREE-JUDGE COURT)

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether an internal rule of a State House of Representatives which governs the disciplining of its own members indicted or convicted of certain specified crimes is a covered change under the Voting Rights Act of 1965.

PARTIES

APPELLANT

Robert J. Sheheen, Speaker of the South Carolina House of Representatives

APPELLEES

Joe Tisdale, Veronica Cooper, John Wesley Adamson, Lizzie R. Brown, Joseph Gordon, Jacques C. Gordon, Arthur Tisdale, Jr., and B. J. Gordon, Jr.

AMICUS CURIAE

United States Department of Justice, Civil Rights Division

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ROBERT J. SHEHEEN, SPEAKER OF THE HOUSE OF REPRESENTATIVES IN HIS OFFICIAL CAPACITY AND AS REPRESENTATIVE OF THE MEMBERSHIP OF THE SOUTH CAROLINA HOUSE OF REPRESENTATIVES,

APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA (THREE-JUDGE COURT)

JURISDICTIONAL STATEMENT

Robert J. Sheheen, the Appellant, appeals from the May 29, 1991, and July 5, 1991, Orders of the Three-Judge Court which held that rules of the South Carolina House of Representatives governing the suspension of its members from office upon indictment and subse-

quent vacating of office upon conviction of certain specified crimes is a covered change under the provisions of the Voting Rights Act that must be submitted and precleared prior to implementation.

OPINIONS BELOW

The May 29, 1991, and July 5, 1991, Orders of the Three-Judge Court have not been reported. They are reprinted in the Appendix hereto, pp. 1a-27a and 28a-30a.

JURISDICTION

The Appellees initiated this suit under the provisions of 28 U.S.C. §§1331(3), 1343(3), and (4); 28 U.S.C. §2201; and 42 U.S.C. §1973c.

On May 29, 1991, and July 5, 1991, the Three-Judge Court issued its Orders. A Notice of Appeal was timely filed on June 27, 1991, and August 2, 1991, from each of these Orders. The jurisdiction of the Court is invoked under 42 U.S.C. §1973c, 28 U.S.C. §2101(b) and 28 U.S.C. §1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

UNITED STATES CONSTITUTION, AMENDMENT X

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

VOTING RIGHTS ACT

42 U.S.C. §1971(a)
42 U.S.C. §1973(a)
42 U.S.C. §1973c

All Voting Rights Act provisions are reproduced in the Appendix

CODE OF FEDERAL REGULATION

28 C.F.R. 51.13 and (g)

> Changes affecting voting include, but are not limited to, the following examples:
>
> * * *
>
> (g) Any change affecting the eligibility of persons to become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or remain holders of elective offices.

SOUTH CAROLINA CONSTITUTION, ARTICLE III, Section II

> Each house shall judge of the election returns and qualifications of its own members, and a majority of each house shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may compel the attendance of absent members, in such manner and under such penalties as may be provided by law or rule.

SOUTH CAROLINA CONSTITUTION, ARTICLE III, SECTION 12

> Each house shall choose its own officers, determine its rules of procedure, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member, but not a second time for the same cause.

R3.12 OF THE SOUTH CAROLINA HOUSE OF REPRESENTATIVES

> In addition to the actions permitted by Section 8-13-250 of the 1976 Code, any member of the House who, while serving as a member of the House, is indicted in a General Sessions Court or a Federal Court for a crime that is a felony, a crime that involves moral turpitude, a crime that has a

sentence of two or more years, or a crime that violates election laws, shall be suspended by the Speaker of the House immediately. This suspension will remain in effect until said House member is acquitted or convicted. In case of conviction, the office shall be declared vacant.

If an election for members of the House intervenes between the time of the suspension and final conclusion of the indictment, the Speaker shall again suspend him at the beginning of the session. The suspended House member will not, at any time, participate in the business of the House.

STATEMENT OF THE CASE

On March 22, 1991, the Appellees filed a lawsuit in the Federal District Court alleging that internal rules of the South Carolina House of Representatives were being improperly implemented against B. J. Gordon, one of the Appellees in this case. Gordon had been a member of the South Carolina House of Representatives who had been suspended upon his indictment for two counts of violating the Hobbs Act; upon his jury conviction, his seat had been declared vacant. The suspension and final vacating of his seat were required by the operation of South Carolina House Rule 3.12. The Appellees alleged, inter alia, that the House Rule was a covered change under the provisions of the Voting Rights Act and had to be precleared before it could be applied to Gordon.

A hearing on the Motion for Temporary Injunction was held before a single judge on March 29, 1991, and denied. No written Order was issued. A full hearing was held before a Three-Judge Court on May 3, 1991. The United States Department of Justice submitted an amicus curiae brief at the request of the Court which argued that the House Rule was a covered change. The Court in its May 29, 1991, Order found the House Rule to be a covered change and required its submission within ten days to the Justice Department for Voting Rights Act review.

The House Rule was submitted on June 3, 1991, with a reservation of the right to appeal the Court's Order that required the submission of this rule. The Justice Department on July 3, 1991, issued a letter of non-objection. The Appellant then moved before the Three-

Judge Court to lift its injunction prohibiting a special election to fill Gordon's seat, as the House Rule had been precleared. The Three-Judge Court on July 5, 1991, issued an order lifting the injunction provided for in its May 29, 1991, Order.

The Appellant on June 27, 1991, filed a Notice of Appeal of the Three-Judge Court's May 29, 1991, Order and on August 1, 1991, filed a second Notice of Appeal of the July 5, 1991, Order insofar as the July 5 Order restated the previous determination of the Court that the House Rule was subject to Voting Rights Act review.

Under the provisions of the Voting Rights Act, a Three-Judge Court must be convened to hear a case brought under 42 U.S.C. 1973c and a direct appeal lies from its Order to the United States Supreme Court.

THE QUESTION IS SUBSTANTIAL

The question as to whether internal rules of a body of the legislative branch of State government is a covered change within the meaning of the Voting Rights Act is a substantial and apparently novel question. The decision of the Three-Judge Court could have a substantial and invasive impact not only on a legislative body's constitutional right to judge its own members but also on any elected body's right to establish internal rules without having to submit them to a review by the Justice Department.

The question presented to this Court is the intended breadth of the Voting Rights Act. The Act itself prohibits the enforcement of

> ... any voting qualification or prerequisite to voting or standard, practice or procedure with respect to voting.... (Emphasis added)

42 U.S.C. §1973c; See also South Carolina v. Katzenbach, 383 U.S. 301 (1966).

Nothing in the Act would seem to signify that it was contemplated that the Voting Rights Act would reach beyond a review of procedures affecting a person's right to vote and elect candidates of his choice and expand into internal rules of elective bodies that govern those elected members.

Only a guideline, one guideline, enacted by the Justice Department through the Code of Federal Regulations suggests this possibility, 28 C.F.R. 51.13(g). It was this guideline that the Three-Judge Court apparently felt compelled to follow. 28 C.F.R. 51.13 lists examples of changes affecting voting. Subsection (g) provides the following as an example of a change:

> Any change affecting the eligibility of persons to

> become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or remain holders of elective offices. (Emphasis added)

The section of the guidelines regarding the right "to become or remain holders of elective offices" has not been the subject of extensive litigation, apparently only being the express subject of litigation in one reported case, Huffman v. Bullock, 528 F.Supp. 703 (M.D. Ala. 1981), and not for the proposition presently before the court of whether internal rules governing elected members of legislative bodies of a state are subject to preclearance.

In Gregory v. Ashcroft, ___ U.S. ___, 111 S.Ct. 2395 (1991), the Supreme Court found that, under the principles of federalism and the Tenth Amendment of the United States Constitution, a state was authorized to establish qualifications regarding mandatory

retirement ages of state judges without United States Congressional influence. The court stated in Gregory that

> [t]he Constitution created a Federal Government of limited powers. 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people.' U.S. Const., Amdt. 10. The States thus retain substantial sovereign authority under our constitutional system.

Gregory, supra, at 2399.

The Court went on to state that

> [t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign. 'It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers...should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States.' Taylor v. Beckham, 178 U.S. 548, 570-571, 20 S.Ct. 890, 898, 44 L.Ed. 1187 (1900). See also Boyd v. Thayer, 143 U.S. 135, 161,

> 12 S.Ct. 375, 381-382, 36 L.Ed. 103 (1892) ('Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen').

Gregory, supra, at 2400-2401.

Likewise, Article III, Sections 11 and 12 of the South Carolina Constitution give the South Carolina House and Senate the exclusive power to judge its own members. The Three-Judge Court's Orders in this case raise substantial questions concerning the power of a federal agency to review a House rule governing the disciplining of its own member, a power given solely, exclusively, and expressly to it by the State Constitution.

The House and Senate have both lost members of their bodies in a federal sting operation conducted by the Office of the U.S. Attorney for the

District of South Carolina, in which several members were indicted and convicted. The House Rule operated to remove the convicted person from the House and declare that seat vacant in the cases where the person did not voluntarily resign upon indictment or conviction.

This case was initially brought on the eve of a scheduled special election to fill not only Appellee Gordon's former House seat but also another member of the House who was not directly involved in this litigation. There was obviously insufficient time to appeal this case to the United States Supreme Court and receive a ruling prior to the election being held in July. It was, therefore, important to allow the elections to proceed and obtain new representatives from those districts which have been without repre-

sentation for a substantial period of time due to the members being suspended following indictments. There was a necessity to fill these offices not only to have the districts represented in the House in general, but especially to have the districts represented at this time when important legislation such as reapportionment and ethics reform is before the House. If the elections had been postponed until after a ruling from the United States Supreme Court, an election could not have been held for these two seats or any others arising from subsequent indictments and convictions for a considerable period of time with the possibility of adversely affecting the operation of state government. Therefore, given these extraordinary circumstances, in order to allow the elections to proceed and new members to be elected

to represent these districts, the House, while reserving its right to appeal the Courts' decision, submitted the rules to the Justice Department as directed by the Court. However, the issue is not moot and has not been mooted by the submission to the Justice Department of the House Rule and it is a situation capable of repetition. Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, (1911); Moore v. Ogilvie, 394 U.S. 814 (1969); Fortune v. King County Democratic County Committee, 598 F. Supp. 761 (E. D. NY 1984).

The issue is not moot in that the House has a two year legislative cycle before adjourning sine die. At the beginning of the next two year term, the House will again have to enact the House Rules, as they have every two years since 1982. When the rules are

reenacted in 1992 they may again be subjected to having to be precleared and definitely would have to be submitted if there is any change in the rules. Additionally, the Justice Department has indicated its intention to apply the Three-Judge Court's ruling to the Senate. On July 3, 1991, the Justice Department sent a letter to the State requesting the Senate to submit its procedures on suspending and removing State Senators and additionally requested the submission of its rules on ethical standards.

The issue is, therefore, not only theoretically capable of repetition, it is presently and specifically at issue regarding whether the provisions of the Voting Rights Act require the Senate to now submit their rules concerning a Senator vacating his

position. 1/

The Order, relying upon the CFR, 51.13(g), vastly expands the possible coverage of the Voting Rights Act to areas not previously considered changes. The Order itself now requires a legislative branch to submit internal rules governing its power to discipline a member. If this interpretation is correct, then it is possible that any elected body that establishes internal rules will now also have to submit these rules for Justice Department review. This apparently would be true

1/ The Appellant was sued in his official capacity as Speaker of the South Carolina House of Representatives. As such he is sued as the alter ego of the State of South Carolina. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909); NAACP v. Committee on Offenses Against the Administration of Justice, 114 S.E.2d 721, 728 (Va. 1960). The State has the ultimate interest in this case and the issue is capable of being repeated in the House and is already at issue in the Senate.

if the body was a state, county or municipal body.

In South Carolina v. Katzenbach, the original case brought contesting portions of the Voting Rights Act, the Court stated that:

> [t]he Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting.... (Emphasis added)

Katzenbach, supra, at 808.

Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, was understood by the Katzenbach Court to require

> ... the suspension of all new voting regulations pending review by federal authorities to determine whether their use would perpetuate voting discrimination. (Emphasis added)

Katzenbach, supra, at 812.

Now Section 5 of the Voting Rights Act is being interpreted by the Three-Judge Court to include not only changes affecting voting but rules of a legisla-

tive branch regarding the continuing qualifications of members of that body.

This Order goes beyond the understood intention of the Act and involves the Justice Department in areas committed to the legislative branch, itself, by the State Constitution.

It is the Appellant's position that the Three-Judge Court Order creates an overbroad interpretation of the Voting Rights Act and one that is beyond the provisions of the United States Constitution or the original intent of the Act.

CONCLUSION

For these reasons, this Court should either summarily reverse the lower court or note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Case No. 3:91-0807-0

JOE TISDALE, VERONICA COOPER, JOHN WESLEY ADAMSON, LISSIE R. BROWN, JOSEPH GORDON, JACQUES C. GORDON, ARTHUR TISDALE, JR. AND B.J. GORDON, JR.,

Plaintiffs,

versus

ROBERT J. SHEHEEN, SPEAKER OF THE HOUSE OF REPRESENTATIVES IN HIS OFFICIAL CAPACITY AND AS REPRESENTATIVE OF THE MEMBERSHIP OF THE SOUTH CAROLINA HOUSE OF REPRESENTATIVES,

Defendant.

O R D E R

Former state legislator Benjamin J. Gordon, Jr. and seven individuals residing in Gordon's state house district seek a declaration that House

Rule 3.12 adopted by the South Carolina House of Representatives, under which Gordon was suspended upon being indicted, and under which his seat was later declared vacant upon his conviction of federal criminal charges, was implemented without necessary preclearance pursuant to section 5 of the Voting Rights Act, 42 U.S.C.A. § 1973c (West 1981). Upon notification by the district court that this action had been filed, the Chief Judge of the United States Court of Appeals for the Fourth Circuit empaneled a three-judge court composed of Circuit Judge William W. Wilkins, Jr. and District Judges Matthew J. Perry, Jr. and Joseph F. Anderson, Jr. in accordance with 28 U.S.C.A. § 2284 (West 1978 & Supp. 1991). We find that House Rule 3.12 constitutes a change in a standard, practice, or procedure with

respect to voting that must be precleared prior to implementation.

I.

The South Carolina House of Representatives first adopted House Rule 3.12 in 1982, and has consistently readopted it each succeeding legislative session. The rule provides:

> In addition to the actions permitted by Section 8-13-250 of the 1976 Code, any member of the House who, while serving as a member of the House, is indicted in a General Sessions Court or a Federal Court for a crime that is a felony, a crime that involves moral turpitude, a crime that has a sentence of two or more years, or a crime that violates election laws, shall be suspended by the Speaker of the House immediately. This suspension will remain in effect until said House member is acquitted or convicted. In case of conviction, the office shall be declared vacant.
>
> If an election for members of the House intervenes between the time of the suspension and final conclusion of the indictment, the Speaker shall again suspend him at the beginning of the session. The

> suspended House member will not, at any time, participate in the business of the House.

H.R. Res. 3001, 109th S.C. Gen. Ass'y., 1st Sess., 1991 South Carolina Legislative Manual 221.

Gordon was elected to the South Carolina House of Representatives in the early 1970's and had served continuously in this capacity until September 1990 when he was suspended pursuant to House Rule 3.12 following indictment by a federal grand jury. Gordon was re-elected to the House in November 1990 and again suspended under House Rule 3.12. A jury convicted Gordon of conspiracy to commit extortion and extortion under color of official right, 18 U.S.C.A. § 1951 (West 1984), on March 8, 1991. Acting under authority of House Rule 3.12, the Speaker of the House declared Gordon's seat vacant on March 11, 1991.

Gordon and seven registered voters from South Carolina House District 101 filed this action on March 22, 1991, against the Speaker of the South Carolina House of Representatives, Robert J. Sheheen, in his individual and representative capacity. 1/ Plaintiffs allege that the implementation of House Rule 3.12 without preclearance constituted a violation of section 5 of the Voting Rights Act. Plaintiffs also contend that House Rule 3.12 violates article III, section 12 of the South Carolina Constitution, which provides that a representative may be expelled

1/ Plaintiffs originally brought suit against four other individuals holding offices with political parties in Williamsburg County, South Carolina or various election commissions. These individuals have been dismissed by consent orders under which they agreed to be bound by and comply with any order of this court.

from the House upon a vote of two-thirds of its members and that a representative may not be expelled more than once for the same reason. Gordon seeks reinstatement to his House seat and a stay of a special election scheduled to fill that vacancy.

House Rule 3.12 was originally adopted in 1982 as a method to ensure public confidence in the legislature following the conviction of one of its members on charges of vote-buying. This forced a vote among the members over whether to expel the individual. It is undisputed that the rule had no effect on any minority legislator when it was adopted and that it has been applied in a consistently non-discriminatory manner. Defendant claims that because the rule was not motivated by a discriminatory intent and because it has not had a discriminatory effect,

House Rule 3.12 is not subject to the preclearance requirement. However, established law is clear that this court may not concern itself with whether the rule actually has a discriminatory purpose or effect. NAACP v. Hampton County Election Comm'n, 470 U.S. 166, 181 (1985). Nor may we consider the appropriateness of the rule or any positive effects it may have produced. The scope of our inquiry does not extend to whether this is a good rule, but is limited to only whether the Voting Rights Act requires its preclearance.

II.

Congress enacted the Voting Rights Act to combat "nearly a century of systematic resistance to the Fifteenth Amendment." South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966). Prior to implementation of a change in

"any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," section 5 of the Act requires 2/ preclearance by either a declaratory judgment of the United States District Court for the District of Columbia that the change "will not have the effect of denying or abridging the right to vote on account of race or color" or by submission to the Attorney General. 3/ 42 U.S.C.A.

2/ The preclearance requirement applies to a state or political subdivision covered by section 4 of the Voting Rights Act. 42 U.S.C.A. § 1973c. South Carolina is a covered jurisdiction. See 28 C.F.R. pt. 51 app. (1990).

3/ A change submitted to the Attorney General may be implemented unless the Attorney General interposes an objection to the change within 60 days. 42 U.S.C.A. § 1973c. Upon a showing of good cause by the party seeking preclearance, the Attorney

§ 1973c. House Rule 3.12 was not precleared prior to implementation; therefore, the issue before this court is whether the rule constitutes a change in a standard, practice, or procedure with respect to voting.

A.

Congress did not define or otherwise clarify what constitutes a standard, practice, or procedure with respect to voting. However, regulations promulgated by the Attorney General interpret the scope of the section 5 preclearance requirement as including

> [any] change affecting voting, even though it appears to be minor or indirect, returns to a prior practice or procedure, ostensibly

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General may affirmatively indicate that he will interpose no objection to the proposed change in order to facilitate expedited approval. Id.

> expands voting rights, or is designed to remove the elements that caused objection by the Attorney General to a prior submitted change.

28 C.F.R. § 51.12 (1990). Congress did broadly define the term "voting" as including

> all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casing a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

42 U.S.C.A. § 1973l(c)(1) (West 1981).

In attempting to give meaning to the phrase, the Supreme Court has looked to "the history and purpose of the Act," Dougherty County, Ga., Bd. of Educ. v. White, 439 U.S. 32, 37 (1978), and concluded that, in enacting

section 5, "Congress intended to reach any state enactment which altered the election law ... in even a minor way," Allen v. State Bd. of Elections, 393 U.S. 544, 566 (1969). The Court has found the following to be examples of a standard, practice, or procedure affecting voting: changing the locations of polling places, Perkins v. Matthews, 400 U.S. 379 (1971); changing from district to at-large elections, Allen, 393 U.S. 544; annexing inhabited land, City of Rome v. United States, 446 U.S. 156 (1980); reapportioning legislative districts, United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977); requiring county employees to take an unpaid leave of absence during their candidacy for or service in elective office, Dougherty County, 439 U.S. 32; and requiring independent candidates to decide whether to run at

the same time party candidates must, Hadnott v. Amos, 394 U.S. 358 (1969. See also 28 C.F.R. § 51.13 (1990). Whether an internal disciplinary rule of a state legislative body is a standard, practice, or procedure with respect to voting within the Voting Rights Act appears to be a case of first impression.

Gordon relies upon a regulation, promulgated by the Attorney General, that provides examples of types of changes that are subject to the preclearance requirement. The regulation provides that "any change affecting the eligibility of persons to become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or remain holders of elective offices" is a standard, practice, or procedure affecting voting. 28 C.F.R. § 51.13(g)

(1990) (emphasis added). Gordon contends that House Rule 3.12 imposes additional requirements--lack of indictment or conviction--upon his eligibility to remain a holder of his office.

The legislative history indicates that the Voting Rights Act was intended to facilitate the enfranchisement of minority voters and focused on voting and the electoral process. Nevertheless, House Rule 3.12 falls squarely within the plain wording of the emphasized portion of subsection (g) of the Department of Justice regulation because it affects the eligibility of representatives to remain holders of their elected offices. The Attorney General's construction of the Voting Rights Act must be given considerable deference by this court, "especially in light of the extensive role played by the Attorney General in drafting the

statute and explaining its operation to Congress." NAACP v. Hampton County Election Comm'n, 470 U.S. at 197 & n.29; accord Dougherty County, 439 U.S. at 39-40. 4/ Because we cannot say that the Attorney General's regulation is an unreasonable interpretation of Section 5 of the Voting Rights Act, see Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984), we find that House Rule 3.12 is a standard, practice, or procedure affecting voting.

B.

In order for the Section 5 preclearance requirement to apply, a

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4/ The Department of Justice submitted an amicus curiae brief in which it expressed its opinion that House Rule 3.12 is a change in a standard, practice, or procedure with respect to voting and is encompassed by Section 51.13(g). Consequently, the Department of Justice maintains that preclearance is required.

given rule must also be "different from that in force or effect on November 1, 1964." 42 U.S.C.A. § 1973c. Defendant concedes that the portion of House Rule 3.12 requiring suspension of a member upon his indictment is a change. Defendant argues, however, that the provision requiring that a member's seat shall be declared vacant upon the member's conviction does not constitute a change.

The South Carolina Constitution provides that a representative may be expelled from the House upon a vote of two-thirds of its members. S.C. Const. art. III, §12. More than two-thirds of the members of the House voted to adopt House Rule 3.12. Defendant claims that the rule merely implements the House members' expulsion power under the state constitution and argues that it can hardly be a change within the mean-

ing of the Voting Rights Act for House members to adopt a rule doing automatically that which they are authorized to do at any time for any legitimate reason on a case-by-case basis.

While this argument has considerable merit, we conclude that this provision of the House Rule does constitute a change. House Rule 3.12 operates automatically and, therefore, forecloses the opportunity the membership possesses under the constitutional provisions to consider the individual circumstances leading to the expulsion vote. House Rule 3.12 establishes a practice or procedure unlike the prior individual determination. While the House Rule undoubtedly offers desirable advantages, nevertheless, it is different from that in effect prior to November 1, 1964.

Defendant also argues that House Rule 3.12 is not a change because under South Carolina law Gordon's seat automatically became vacant upon his conviction apart from the operation of the rule. The South Carolina Constitution provides that "[n]o person shall be eligible for a seat in the ... House of Representatives who, at the time of his election, is not a duly qualified elector." S.C. Const. art. III, § 7. Individuals who are convicted of a felony are disqualified as electors and thus ineligible to seek elected office in the South Carolina Legislature "unless the disqualification [is] removed by service of the sentence" or pardon. S.C. Code Ann. § 7-5-120(4)(b) (Law. Co-op. Supp. 1990). Defendant argues that upon Gordon's conviction, he became disqualified as an elector and, therefore, disqualified to hold office

since, they contend, qualification is a continuing requirement. While we recognize the appeal of this argument, we are nonetheless bound to apply the plain wording of the South Carolina Constitution as written. Article III, Section 7 inescapably applies only to the eligibility of an individual "at the time of his election" and imposes no continuing eligibility requirement on officeholders. Whether a convicted felon should continue to hold public office is not before us, only the issue of whether the South Carolina Constitution speaks to that situation. It does not, and we may not rewrite it or strain its specific language in order to reach any particular result. Finally, the adoption of the House Rule 3.12 by the House of Representatives is strong evidence that this constitutional provision was not viewed as operat-

ing to automatically expel the convicted felon as defendant now contends.

C.

Defendant contends that if House Rule 3.12 is a standard, practice, or procedure affecting voting merely because the rule prevents an elected representative from serving through the completion of his elected term of office when the House removes him for misconduct, then each vote by the South Carolina House, or any other elected body, disciplining its members for misconduct by removing them from the membership would also require preclearance. This contention lacks merit because the state constitution empowers the House to remove a representative upon a vote of two-thirds of its members and because individual disciplinary decisions of the legislature do not constitute a practice or proce-

dure. See White v. Dougherty County Bd. of Educ., 579 F. Supp. 1480 (M.D. Ga. 1984), aff'd, 470 U.S. 1067 (1985) (individual personnel decisions do not constitute a practice within meaning of Voting Rights Act). We are not faced with an individual disciplinary decision but with House Rule 3.12 as it applies to all members of the House.

III.

Having concluded that House Rule 3.12 is a standard, practice, or procedure with respect to voting and, therefore, may not be implemented without preclearance, we must turn our attention to the appropriate relief. Section 5 requires that the state must not implement a change affecting voting "unless and until" it has been precleared. 42 U.S.C.A. § 1973c. Failure to obtain preclearance "renders

the change unenforceable". Hathorn v. Lovorn, 457 U.S. 255, 269 (1982). Therefore, we enjoin further application of House Rule 3.12 insofar as it permits the Speaker of the House to suspend representatives or declare their seats vacant. Additionally, we enjoin any future special election scheduled to fill a seat declared vacant pursuant to the rule. This injunction will remain in effect until such time as the state demonstrates to the satisfaction of this court that the rule has received preclearance.

With respect to Gordon's request for reinstatement, the Department of Justice suggests in it amicus curiae brief that it would be appropriate to afford the state an opportunity to seek preclearance and that this court should consider the propriety of Gordon's request for reinstatement only if

the state fails to pursue preclearance or if House Rule 3.12 fails to gain federal approval. See Berry v. Doles, 438 U.S. 190 (1978). Additionally, in its brief the Department of Justice represents to the court that it is prepared to give expedited consideration to a submission if one is made by the state. See C.F.R. § 51.34 (1990). While we may not consider whether this rule has been applied in a discriminatory manner in deciding whether preclearance is required, this factor is significant in fashioning an appropriate remedy. We conclude that the circumstances surrounding the adoption and implementation of House Rule 3.12 are within the class of situations for which the procedure suggested by the Department of Justice is appropriate. Accordingly, we allow the state to seek, within ten days from the fil-

ing of this order, preclearance of House Rule 3.12 on an expedited basis. If the rule is approved by the Attorney General, this matter is ended. In the event the state fails to pursue preclearance, or if federal approval is not obtained, Gordon is free to renew his request for appropriate relief.

IV,

Gordon also contends that his suspensions and expulsion violate various provisions of the South Carolina Constitution. Defendant, however, correctly argues that, insofar as Gordon seeks relief under state law, a determination by this court is foreclosed by the eleventh amendment. We agree that this court may not entertain a suit against a non-consenting state official premised upon a violation of state law.

The eleventh amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. This amendment prohibits suits brought by citizens against their own state. Hans v. Louisiana, 134 U.S. 1 (1890). States may not be sued "in federal court unless they consent to it in unequivocal terms or unless Congress, pursuant to a valid exercise of power, inequivocally expresses its intent to abrogate the immunity." Green v. Mansour, 474 U.S. 64, 68 (1985).

The eleventh amendment also "bars a suit against state officials when 'the state is the real, substantial party in interest.'" Pennhurst State School & Hosp. v. Halderman, 465 U.S.

89, 101 (1984) (quoting Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459, 464 (1945)). An exception to the eleventh amendment prohibition to suits against state officials exists for suits "challenging the constitutionality of a state official's action." Id. at 102; accord Ex parte Young, 209 U.S. 123 (1908). This exception, however, is inapplicable to suits that challenge a state official's actions on the basis of state law. Pennhurst, 465 U.S. at 106. Federal courts are not empowered to "instruct[] state officials on how to conform their conduct to state law." Id. We, therefore, decline to entertain Gordon's request for injunctive relief against a non-consenting state official premised upon an alleged violation of the South Carolina Constitution. The appropriate forum for

resolution of these claims is the state court.

V.

For the foregoing reasons the court finds that Gordon's allegations concerning violations of state law may not be addressed by this court and are dismissed without prejudice. The court concludes that no material issues of fact are present and plaintiffs are entitled as a matter of law to a declaration that House Rule 3.12 constitutes a change in a standard, practice, or procedure with respect to voting that may not be implemented without preclearance pursuant to the Voting Rights Act. Further implementation of House Rule 3.12 and any future special election for the purpose of filling a seat vacated by operation of the rule are enjoined until such time as the state satisfies the court that it has

obtained preclearance. Reinstatement of Gordon to the House of Representatives is denied. If the State of South Carolina seeks preclearance within ten days of the filing of this order and if federal approval is obtained, this matter is ended. If the state elects not to seek preclearance or if approval is not obtained, Gordon may renew his request for appropriate relief.

IT IS SO ORDERED.

/s/William W. Wilkins, Jr.
United States Circuit
Judge

/s/ Matthew J. Perry, Jr.
United States District
Judge

/s/ Joseph F. Anderson, Jr.
United States District
Judge

Columbia, South Carolina

May 29, 1991

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

CASE NO. 3.91-0807.0

JOE TISDALE, VERONICA COOPER, JOHN WESLEY ADAMSON, LIZZIE R. BROWN, JOSEPH GORDON, JACQUES C. GORDON, ARTHUR TISDALE, JR., AND B. J. GORDON, JR.,	)
Plaintiffs,	)
versus	)
ROBERT J. SHEHEEN, SPEAKER OF THE HOUSE OF REPRESENTATIVES IN HIS OFFICIAL CAPACITY AND AS REPRESENTATIVE OF THE MEMBERSHIP OF THE SOUTH CAROLINA HOUSE OF REPRESENTATIVES,	)
Defendant.	)

O R D E R

By order entered on May 31, 1991, this court concluded that House Rule

3.12 adopted by the South Carolina House of Representatives constituted a standard, practice or procedure with respect to voting which could not be implemented without preclearance pursuant to § 5 of the Voting Rights Act, 42 U.S.C.A. § 1973c (West 1981). The court enjoined any future special election scheduled to fill a seat declared vacant pursuant to House Rule 3.12 "until such time as the state demonstrates to the satisfaction of this court that the rule has received preclearance." May 31, 1991 order at 11-12.

Special elections to fill seats vacated under House Rule 3.12 have been scheduled for July 9, 1991. Plaintiffs have moved for an order holding defendant in contempt and permanently enjoining the July 9, 1991 elections. Subsequent to the filing of this motion,

defendant advised the court that House Rule 3.12 has received preclearance. Defendant also moved for an order lifting the injunction.

The rule in question having been duly precleared, no reason exists to delay the July 9 elections. Accordingly, plaintiffs' motion is denied. The injunction entered on May 31, 1991, is hereby dissolved.

ENTERED at the direction of Circuit Judge William W. Wilkins, Jr. and District Judges Matthew J. Perry and Joseph F. Anderson, Jr.

July 5, 1991
Columbia, South Carolina.

[Filed July 5, 1991]

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

CASE NO. 3.91-0807.0

JOE TISDALE, VERONICA COOPER, JOHN WESLEY ADAMSON, LIZZIE R. BROWN, JOSEPH GORDON, JACQUES C. GORDON, ARTHUR TISDALE, JR., AND B. J. GORDON, JR.,	)
PLAINTIFFS,	)
VS.	)
ROBERT J. SHEHEEN, SPEAKER OF THE HOUSE OF REPRESENTATIVES IN HIS OFFICIAL CAPACITY AND AS REPRESENTATIVE OF THE MEMBERSHIP OF THE SOUTH CAROLINA HOUSE OF REPRESENTATIVES,	)
DEFENDANT.	)

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE
UNITED STATES

Notice is hereby given that Robert J. Sheheen, Defendant above-named, hereby appeals to the Supreme Court of the United States from the Order entered on May 29, 1991. This appeal is

taken under the provisions of 42 U.S.C. §1973 (c) and 28 U.S.C. §2101 (b).

Respectfully submitted,

EDWIN E. EVANS
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Federal I.D. No. 743

JOSEPH D. SHINE
Chief Deputy Attorney General
Federal I.D. No. 3826

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BY: /s/ Joseph D. Shine
/s/ Edwin E. Evans
/s/ Treva Ashworth
Attorneys for the Defendant, Robert J. Sheheen, Speaker of the House of Representatives

Columbia, South Carolina

June 27, 1991.

[Filed June 27, 1991]

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

CASE NO. 3.91-0807.0

JOE TISDALE, VERONICA COOPER, JOHN WESLEY ADAMSON, LIZZIE R. BROWN, JOSEPH GORDON, JACQUES C. GORDON, ARTHUR TISDALE, JR., AND B. J. GORDON, JR.,	)
PLAINTIFFS,	)
VS.	)
ROBERT J. SHEHEEN, SPEAKER OF THE HOUSE OF REPRESENTATIVES IN HIS OFFICIAL CAPACITY AND AS REPRESENTATIVE OF THE MEMBERSHIP OF THE SOUTH CAROLINA HOUSE OF REPRESENTATIVES,	)
DEFENDANT.	)

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE
UNITED STATES

Notice is hereby given that Robert J. Sheheen, Defendant above-named, hereby appeals to the Supreme Court of the United States from the Order of the three-judge District Court filed on

July 5, 1991, insofar as it restates the previous determination of the three-judge District Court of their Order filed on May 29, 1991, and appealed from on June 27, 1991, that House Rule 3.12 adopted by the South Carolina House of Representatives "...constituted a standard practice of procedure with respect to voting which could not be implemented without preclearance pursuant to §5 of the Voting Rights Act...." An Appeal is, therefore, taken of both Orders as specified above under the provisions of 42 U.S.C. §1973 (c), 28 U.S.C. §2101 (b) and 28 U.S.C. §1253.

Respectfully submitted,

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Attorney General
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(signatures continued)

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the House of Representatives

Columbia, South Carolina

August 1, 1991.

[Filed August 2, 1991]

VOTING RIGHTS ACT

42 U.S.C. §1971.

(a)(1) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

(2) No person acting under color of law shall -

(A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have found by State officials to be qualified to vote;

(B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election; or

(C) employ any literacy test as a qualification for voting in any election unless (i) such test is administered to each individual and is conducted wholly in writing, and (ii) a certified copy of the test and of the answers given by the individual is furnished to him within twenty-five days of the submission of his request made within the period of time during which records and papers are required to be retained and preserved pursuant to Title III of the Civil Rights Act of 1960: Provided, however, That the Attorney General may enter into agreements with appropriate State or local authorities that preparation, conduct, and maintenance of such tests in accordance with the provisions of applicable State or local law, including such special provisions as are necessary in the preparation, conduct, and maintenance of such tests for persons who are blind or otherwise physically handicapped, meet the purposes of this subparagraph and constitute compliance therewith.

(3) For purposes of this subsection -

(A) the term 'vote' shall have the same meaning as in subsection (e) of this section;

(B) the phrase 'literacy test' includes any test of the ability to read, write, understand, or interpret any matter.

42 U.S.C. §1973

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

42 U.S.C. §1973c.

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention

of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28

and any appeal shall lie to the Supreme Court.